



# British Columbia

## MENTAL HEALTH REVIEW BOARD

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**Effective Date: 2020/01/31**

**Title: Practice Direction – Disclosure**

This Practice Direction describes the procedures that must be followed for disclosure of documents to ensure a fair and timely hearing.

**Guiding Principles:**

The Mental Health Review Board [Board] honours the obligations and is guided by the principles contained in the *United Nations Convention on the Rights of Persons with Disabilities* and the values contained in the *Charter of Rights and Freedoms*.

**Summary:**

Parties appearing before the Mental Health Review Board [Board] have document disclosure obligations under the *Rules of Practice and Procedure* and the Board has the authority to order the production of documents under the *Mental Health Act [Act]*. These guidelines on disclosure apply primarily to facilities because they create, compile, and retain patient records that are relevant to Board proceedings. Patients must know the evidence that will be presented with sufficient time in advance of their hearing in order to have an opportunity to prepare a response and challenge that evidence.

**Disclosure by facilities step-by-step:**

1. Facilities have a duty to disclose copies of all documents in their possession or control that are relevant to the review panel hearing [Relevant Documents]. Patients and legal representatives do not have to use a freedom of information request to obtain access to records. The right to disclosure exists independently of the *Freedom of Information and Protection of Privacy Act [FIPPA]*. Facilities are not required to give access to any original patient records.
2. Disclosure obligations of a facility are triggered after receiving a hearing notice from the Board.
  - a) For patients represented by the Mental Health Law Program [MHLP]:
    - No further action is required.
    - You have consented to the release of your records when you selected representation by the MHLP on the Form 7.
  - b) For patients represented by non-MHLP representatives:
    - Further action is required.
    - The facility will ask you to complete a form. **You must complete this form as soon as possible and no later than 24 hours after coming on record for your client.** The form confirms your name and contact information, that you are acting for the patient, and that you understand the confidentiality obligations regarding the requested documents.

- c) For self-represented patients:
- The facility will help you to complete a simple form.
  - You may ask to review copies of your records. The facility will provide you with a room and enough time to review your records. You can agree on a time to review your records. Someone from the facility may be in the room with you.
3. Facilities must provide a copy of all Relevant Documents as early as possible and no later than 24 hours before the start of the hearing. In exceptional circumstances – for example, in remote facilities with significant resource constraints or in cases of last-minute patient transfers – the Relevant Documents may be disclosed no later than 30 minutes before the start of the hearing.
  4. Facilities must provide the Relevant Documents at their own expense.
  5. Facilities must make every reasonable effort to **help self-represented patients** get ready for their hearing. This may include providing patients with information, documents, or a private room to prepare. Facilities must ask the self-represented patient whether they want to review their documents before their hearing, and if so, help them complete the form. Facilities must not require patients to make a freedom of information request when they want to see the Relevant Documents before their hearing.

## What to disclose

Facilities have a duty to disclose all Relevant Documents. A document is relevant if it contains evidence that goes to any issue that must be decided at a hearing. There are four issues<sup>1</sup> that must be decided at a review panel hearing:

1. Is the patient suffering from a disorder of the mind that requires psychiatric treatment and seriously impairs their ability to react appropriately to their environment or to associate with others?
2. Does the patient require psychiatric treatment in or through a designated facility?
3. Does the patient require care, supervision and control in or through a designated facility to prevent their substantial mental or physical deterioration or for their own protection or the protection of others?
4. Can the patient not be suitably admitted as a voluntary patient?

Any document referred to or relied on in a case note or by a case presenter is considered a Relevant Document and must be disclosed 24 hours in advance of the hearing. A non-exhaustive list of Relevant Documents may include:

- Forms (Forms 4 and 6)
- Other Forms (Forms 11, 12 and 21)
- Medical reports, including attending physician reports
- Past admission/discharge notes and summaries
- Psychiatric Progress reports
- Mental Health Team assessments
- Attending physician notes
- Therapy notes
- Any document that will be referred to or relied on in the case note and presentation

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<sup>1</sup> The legal test is set out in section 22 of the Mental Health Act.

## **Disclosure is an ongoing obligation**

Disclosure obligations are ongoing and relevant records that are acquired or generated between the time of initial disclosure and the hearing must also be disclosed promptly before the hearing where reasonably practicable.

## **Documents obtained through the disclosure process are confidential**

A party must only use a document obtained through the disclosure process for the hearing. If a party wants to use a document for another purpose, they must get consent from the patient or an order of the Board.

## **Reasonable limits on disclosure**

A basic starting point for meeting the duty of procedural fairness is putting the patient and their representative in a position to know the case they must meet. In nearly all cases, medical records must be disclosed in full. Not allowing access to medical records may serve to undermine that principle and interfere with a just result. Justice is best served when the patient and their representative have complete information of the case to be met.

Balanced against these procedural fairness rights is the recognition that there may be appropriate exceptions to the disclosure of records. The threshold is high. It would require an exceptional set of circumstances where relevant records would not be disclosed. For example:

- Information contained in a medical record that would identify a person who has made a report under the *Adult Guardianship Act*.
- Information that was obtained on a confidential basis which if disclosed, would likely endanger the life or safety of the patient or another person, or would likely seriously impair the care or treatment of the patient.

If a facility has decided to limit disclosure, it must notify and explain to the patient or their representative the exceptional circumstances that apply to any severed or redacted document. Because a review panel is a legal proceeding, the *FIPPA* does not, on its own, justify limits on disclosure.<sup>2</sup> However, there may be situations where the exceptions set out in *FIPPA* meet this high threshold. The parties are encouraged to resolve these issues on consent.

## **Orders for disclosure**

If these issues cannot be resolved on consent, a party may apply to the Board for an order for disclosure of documents. The application must state the position of the other party and why the application is fair and reasonable in the circumstances. The application must be provided to the other party at the same time it is filed with the Board. Where appropriate, the Board will seek a response from the other party before making a decision on the application. The Board will make any order that is just, fair and reasonable in the circumstances. Any order or decision of the Board regarding disclosure will be made in writing.

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<sup>2</sup> Section 3(2) of *FIPPA* states that *FIPPA* does not limit the information available by law to a party to a proceeding

## **Consequences of failure to disclose**

There are consequences for failure to disclose documents:

- The case presenter may not introduce the document as evidence at the hearing without permission of the panel;
- If the panel grants permission, the panel will give participants a reasonable amount of time to review the evidence;
- This may create delays in the hearing; and
- The Board or panel may make any other decision or order it considers fair and appropriate in the circumstances.

**Diana Juricevic**  
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